IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1833

PAUL RICE and
JOHN LESLIE WELLS, JR.,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 20, 1977, entitled United States of America versus Paul Rice, Pedro Alvarez, John Leslie Wells, Jr., and Jerold Massler.

OPINION BELOW

No reported opinion of the United States District Court for the Middle District of Florida, Tampa Division, was issued; a copy of the Court's Order of February 24, 1976, is reprinted in the appendix at 1a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 550 F.2d 1364 (1977), and is reprinted in the appendix to this petition at 12a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was filed on April 20, 1977. On May 24, 1977, a petition for rehearing was denied. This petition is filed within the time allowed for the filing of such petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case presents constitutional issues concerning the ability of an accused to present an adequate criminal defense in light of an extended delay between the time the alleged crime was committed and the time the Grand Jury returned an indictment against the accused. Additional constitutional issues are presented with respect to the right to a fair trial when evidence is introduced by a co-defendant which is arguably exculpatory as to him but is highly inculpatory as to another co-defendant. The relevant circumstances require (1) a determination as to whether an accused who moves for dismissal of the charges against him on the basis of pre-trial delay is entitled to a hearing on that motion, in light of previous decisions with respect to pre-indictment delay; and (2) the right of a defendant to a separate trial when highly prejudicial evidence is admitted without either a sufficient limiting instruction or an explanation of

the source of the evidence to the jury.

The present case presents the following questions with respect to these issues:

1. Were Petitioners' rights under the due process clause of the fifth amendment violated when the trial court failed to hold a hearing on Petitioners' motion to dismiss for pre-indictment delay when approximately three and one-half years had elapsed between the time of the alleged offense and the return of the indictment, and where the record showed that no new evidence was developed by the Government during the period of the delay?

2. Was Petitioners' right to a fair trial violated when a co-defendant was allowed to introduce an undated, handwritten statement of a Government witness which was exculpatory as to that co-defendant but inculpatory as to Petitioners; which was submitted to the jury without an explanation of its source or of the objections to its introduction and without a sufficient limiting instruction, and when Petitioners' motion for a severance based on the highly prejudicial nature of the statement was denied by

the trial court?

STATUTORY PROVISIONS INVOLVED

This case presents issues arising under the fifth amendment to the United States Constitution, which provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Also presented are issues arising under the sixth amendment to the United States Constitution, which provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

In addition, the case presents issues arising under Fed. R. Crim. P. 14, which provides, in part: "If it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide other relief as justice requires."

STATEMENT OF THE CASE

Petitioners and their co-defendants, Pedro Alvarez, and Jerold Massler, were indicted in a one count bill for conspiracy to import, possess and distribute marijuana during the period from January 1972, until June 1972, in violation of 21 U.S.C. §§ 952(a) and 841(a)(1). Petitioners were found guilty and sentenced to serve a prison term of two and one-half years for Rice and one year and a day for Wells.

Petitioners were alleged to be airplane pilots charged in the conspiracy. The evidence, through the Government's witness, Kilgore, an un-indicted co-conspirator, showed that Petitioners Rice and Wells flew to Columbia, South America, about April 8, 1972, and returned with a plane load of marijuana. No evidence of subsequent alleged criminal activities was introduced with respect to Petitioners. The record showed that the Government had gathered all of the evidence which it introduced at the trial by the end of 1972 or early 1973. Nevertheless, the Government did not submit

its information to the Grand Jury until May 1975, and did not seek an indictment until October 1975. During the period of the delay, the Government seized the records of Zephyrhills Airport in Florida, the alleged point of origin and return for the flight to Columbia. In addition, during this period, records of certain hotels and motels where, according to Kilgore, the Petitioner and his co-defendants allegedly met were destroyed. Also, records of alleged airline flights of the witness Kilgore were destroyed. The records of Petitioner Wells' employer, Tampa Air Center, Inc., showing his work and flight schedules were destroyed by fire. During this delay, the Government was doing nothing more to investigate the case for bringing the indictment.

Petitioner Rice filed a motion to dismiss on grounds of excessive pre-indictment delay, alleging actual prejudice due to the delay and intentional delay by the Government to gain a tactical advantage, as required by United States v. Marion, 404 U.S. 307 (1971). The motion was denied without a hearing on February 24, 1976,

five days before the trial was to begin. Later, Petitioner Wells joined in the motion on dismissal for pre-indictment delay.

At trial, defendant Massler was allowed to introduce a statement written by Kilgore, apparently in 1972 (but dated November 1971), which was a detailed summary of the events underlying the indictment. (Appendix 1a). The statement, admitted into evidence as "Massler's Exhibit No. 1" mentioned all of the defendants by name with the exception of Massler. All other defendants, including Petitioners, moved for severance due to the prejudicial nature of the document. The court admitted the exhibit into evidence, outside the presence of the jury. The exhibit was not published to the jury in the Courtroom, nor did the jury have any knowledge of the origin, purpose or introducer of the exhibit or any objections to it. The court allowed the exhibit to be sent to the jury without any explanation and without a limiting instruction.

On appeal, the United States Court

of Appeals for the Fifth Circuit affirmed Petitioner's conviction, stating, inter alia, that the allegations of the motion to dismiss were so general and conclusory that it was not error to refuse to hold a hearing on the motion, and that a limiting instruction as to the weight of the Massler exhibit was, in fact, given. (Appendix 39 a).

Petitioners contend that the trial court should have granted a hearing on the motion to dismiss for pre-indictment delay, in order to give Petitioners an opportunity to prove the allegations contained in the motion itself, and to show the Government's delay was not for the purpose of a continuing investigation, but was a delay to gain a tactical advantage over the Petitioners. Only at a hearing, Petitioners submit, could evidence be properly developed and introduced as to the prejudicial effect of the delay and the reasons for the Government's decision to wait over three years before seeking an indictment. Petitioner submits further that Massler's Exhibit No. 1 was so highly prejudicial to his defense that, under prior decisions of this and other

courts, failure to grant a severance would result in denial of his right to a fair trial.

REASONS FOR GRANTING THE WRIT

1. THE LENGTH OF THE PRE-INDICTMENT DELAY WAS SO PREJUDICIAL TO THE PREPARATION OF PETITIONERS' DEFENSE AS TO DENY DUE PROCESS OF LAW.

In United States v. Marion, 404 U.S. 307 (1971), this Court recognized that one of the principal safeguards for citizens against stale prosecutions were the applicable statutes of limitations. However, the Court recognized that pre-indictment delay within the limitation period could be cause for dismissal if the defendant could show that the delay caused actual prejudice to the preparation of the defense, and that the delay was purposeful by the Government in order to gain a tactical advantage. Other courts have followed the Marion rule in holding that any unreasonable or unnecessary delay which results in prejudice to the accused can necessitate dismissal of the charges against him. E.g.,

United States v. Jones, 173 U.S. App. D.C. 280, 524 F.2d 834 (1975); United States v. Baum, 435 F.2d 1197 (7th Cir.), cert. denied, 402 U.S. 907 (1970).

The Petitioner Rice moved to dismiss the indictment under Fed. R. Crim. P. 48(b) (subsequently adopted by Petitioner Wells), because of the pre-indictment delay of nearly three and one-half years. (The motion is reproduced in Appendix 52a). An earlier motion for dismissal and for an evidentiary hearing had been made by the Defendant Massler, subsequently adopted by Petitioners. (The motion is reproduced in Appendix 45a). The Petitioners alleged that the delay deprived them of the ability to produce an adequate defense and to produce alibi witnesses. Petitioners further argued that the seizure, by the Government, three years earlier, of the records and files of Zephyrhills Airport and the continuing refusal of the Government to make those documents available to the Petitioners were also prejudicial to the preparation of the defense. In support of their contention that the delay was intentional by the

Government to gain a tactical advantage, the Petitioners stressed that in spite of the fact that all of the information and witnesses essential to the prosecution were known to the Government in early 1973, it delayed seeking an indictment until October 1975. Further, the Petitioners argued that the delay was intentional to procure evidence of subsequent alleged unrelated acts of co-defendants, other than the Petitioners. Despite all of these allegations, the motion to dismiss was denied by the District Court without a hearing in its Order of February 24, 1976. (Appendix 4a). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the denial of the motion, stating that the Petitioners' claims were mere "[s]peculative assertions," and that there was no showing of actual prejudice. United States v. Rice, 550 F.2d 1364, 1369 (5th Cir. 1977). The Petitioners respectfully submit that it was error to deny the motion to dismiss without holding an evidentiary hearing because the allega-

tions of the motion, if proven, plus other facts to be shown, would arguably have entitled Petitioners to dismissal of the charges against them. Further the Petitioners respectfully submit that because of the general policy favoring a liberal interpretation of procedural rules, the motion to dismiss stated a valid claim entitling them to an evidentiary hearing on the motion.

It is submitted that a hearing on the Petitioners' motion was a required hearing under the Fed. R. Crim. P. 12(c), absent a reservation of the ruling to the conclusion of trial, a call by the court for submission of affidavits or the opportunity for oral arguments, which has been afforded in all other pre-indictment delay cases. This case squarely presents the case where the lower court must afford a defendant charging prejudice and delay by the Government for tactical reasons an opportunity to supplement the motion by producing evidence if requested by an evidentiary hearing and is analogous to Blackledge v. Allison,

45 U.S.L.W. 4435 (U.S. No. 75-1693, May 3, 1977).

As previously noted, in order for a motion such as this to stand, one must show (1) that actual prejudice resulted from the delay, and (2) that the delay was an intentional measure to gain tactical advantage or to harass. United States v. Marion, supra; United States v. Lovasco, ___ U.S. ___, 21 Cr. L. Rptr. 3102 (No. 75-1854 June 9, 1977); United States v. McClure, 153 U.S. App. D.C. 370, 473 F.2d 81 (1972). One court has appropriately summarized the essential question to be answered by the application of the two-fold test as being "whether the delay has impaired the Defendant's ability to defend himself." United States v. Crow Dog, 532 F.2d 1182, 1194 (8th Cir. 1976).

The Petitioners acknowledge the requirement that they prove prejudice. However, it has been held that the specificity with which prejudice must appear decreases as pre-accusatory delay increases. United States v. Naftalin, 534 F.2d 770 (8th Cir. 1976). The delay in the case

at bar is approximately forty months. Thus, the required specificity of prejudice would be less here than in a case such as Lovasco, supra, in which the pre-indictment delay was only eighteen months. The other allegations of prejudice contained in the motion to dismiss, with other facts to be shown, if proved, might have entitled the Petitioners to a dismissal. However, they were given no opportunity to prove the allegations because the District Court held no hearing on the motion. The Petitioners contend that a defendant should not be required to prove the claim of such a motion within the motion itself. Instead, the proper place for a test of the movant's proof should be an evidentiary hearing on the motion. At the very least, if the motion is deemed lacking in specificity, the defendant should be permitted to supplement the motion. In the case at bar, an order of denial of the motion to grant an evidentiary hearing on February 24, 1976, five days

prior to trial, with a weekend included, and further supplementation was precluded not only by time factors, but by the order itself.

On March 1, 1976, the first day of trial, a further motion for an evidentiary hearing relating to the Government's chief witness, Kilgore, was made and denied. (Appendix 59a). A hearing on this motion could have further demonstrated the prejudice the delay had caused the Petitioners.

While acknowledging the requirement that they prove prejudice, the Petitioners respectfully submit that the Government has a duty to come forward and explain what caused its delay in light of the fact that the crime was known to the Government almost from its inception, and the fact that no new evidence was developed during the long delay. The Government offered no explanation for its long delay in this case, nor denied that it had all the evidence necessary for securing the indictment in late 1972 or early 1973. As Mr. Justice Brennan observed in his concurring opinion in Marion, supra,

"[L]engthy delay, even in the interests of realizing an important objective, is suspect." 404 U.S. at 470.

In United States v. Butts, 524 F.2d 975 (5th Cir. 1975), the court stated that the Government could delay seeking an indictment until it had sufficient admissible evidence for conviction. This proposition was upheld by this Court in the recent case of United States v. Lovasco, supra. The court stated:

> [T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

21 Cr. L. Rptr. at 3105. However, the instant case is distinguishable from Lovasco for two reasons. First, there is no indication in the record here that the Government conducted a continuing investigation, and no evidence acquired after early 1973 was presented by the Government at trial. By contrast, in

Lovasco, the record showed that the investigation was ongoing as to the potential involvement of the defendant's son in the firearms transactions which formed the basis of the indictment. In the instant case, however, it would appear that the Government's investigation into the transaction underlying the indictment was completed more than two years before the indictment was returned. Thus, the delay would seem wholly unnecessary. Under these circumstances, Petitioners submit that the Government should be required to offer some explanation for the delay.

The only fair means consistent with due process standards by which both sides can be heard on a motion to dismiss is an evidentiary hearing. Such a procedure has been routinely used to determine the merit of motions to dismiss for pre-indictment delay. See, e.g., Marion, supra; Lovasco, supra; Butts, supra; United States v. Barket, 530 F.2d 189 (8th Cir. 1976); United States v. Quinn, 520 F.2d 357 (8th Cir. 1976);

United States v. Washington, 504 F.2d 346 (8th Cir. 1974); United States v. Costanza, 549 F.2d 1126 (8th Cir. 1977); United States v. Mays, 549 F.2d 670 (9th Cir. 1977); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969). While no decision as yet has specifically held that a defendant is entitled to such a hearing, only at a hearing can the court adequately weigh the factors to which this Court addressed itself in Marion, supra, wherein it stated:

> Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the Defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances

of each case.

404 U.S. at 325-26.

It is interesting to note that an evidentiary hearing was held in Marion even though no evidence was presented at that hearing other than the arguments of counsel. Id. at 309. On the motion to dismiss in Lovasco, there was an extensive evidentiary hearing at which evidence was offered and arguments of counsel heard before the Court entered its order. In the case at bar, had the Petitioners been granted a hearing, they could have adequately presented their specific contentions that the delay caused the loss of alibi and other witnesses, the destruction of material evidence, and such other factors as the blurring of memories. In addition, only at a pre-trial hearing could the Petitioners have called on the Government to account for the delay in bringing the indictment. Finally, the procedure would have been the only adequate means of requiring the court to review the Government's behavior and motives.

In the other pre-indictment delay cases, the situations have been different

from this case. The Petitioners were given no indications, prior to the indictment, that they were the subject of a criminal investigation. The Government withheld the identity of its chief witness, Kilgore, until shortly prior to trial despite efforts of the Petitioners through discovery to obtain such information. The Petitioners were severely hampered in showing in their motions more specific acts of prejudice and intentional delay by the Government. In other pre-indictment delay cases, the court has permitted hearings, arguments and affidavits for the parties to show the circumstances of delay and the prejudice caused by the delay.

In United States v. Smith, 412 F. Supp. 1 (S.D.N.Y. 1976), on a confession and avoidance, a motion was made to dismiss for pre-indictment delay and the court held "The motion to dismiss is denied without prejudice to its renewal at the close of the Government's case. At that point, both the court and the parties will be in a better position to evaluate

the length and circumstances surrounding any delay. "This afforded the defendant an opportunity to develop this material during trial which was not afforded the Petitioners in the instant case.

The trial itself did not show investigative reasons for the Government's delay, only that there was a delay of three and one-half years. It appears from the trial record, that the Government's primary reason for delay was to obtain a tactical advantage over the Petitioners in that the Government delayed to a date subsequent to the conviction of its main witness of similar unrelated activities and later unrelated criminal activities for which said witness, Kilgore, was never indicted and then later granted Kilgore informal immunity, the details of which were never before the court, in order for Kilgore to testify to activities he had already disclosed in a statement some three years earlier. A hearing would have afforded an opportunity to investigate this delay, especially as to the matter of why there was a three year

delay of an indictment based on testimony of a witness who had made a statement three years earlier. United States v. Marion, supra at 333, n. 4.

The denial of the evidentiary hearing allowed these matters in part to surface for the first time during the course of the trial and further prejudiced the Petitioners.

In United States v. Crow Dog, supra, the court, in discussing a delay between indictment and trial, stated: "While the responsibility for the delay appears to rest in some measure on both prosecution and defense, we realize the Government must ultimately bear the greater share." 532 F.2d at 1193. Such reasoning should also extend in the case at bar to the pre-indictment stage, at least to the point of requiring the Government to explain the delay. As Mr. Justice Brennan stated in his concurring opinion in Marion, supra:

> To determine the necessity for governmental delays, it would seem important to consider on the one hand, the intrinsic

> importance of the reason for the delay and its potential for prejudice to interests protected by the speedy trial safeguard.

These considerations were recognized by the court in United States v. Lee, 413 F.2d 910 (7th Cir. 1969). The defendant filed a motion for dismissal, arguing that she was prejudiced by "unnecessary" delay in presenting the charge to the Grand Jury. She was arrested approximately ten months after an alleged sale of heroin and indicted nearly eleven months after arrest. Her motion was based, inter alia, on Fed. R. Crim. P. 48(b). The court, in looking at the language of Rule 48(b), stated:

> [I]t implies a burden on the Government to show necessity if the delay is questionably long. But the proof is not required unless there is some evidence of prejudice to the Defendant.

413 F.2d at 912. Such prejudice was asserted in the Petitioners' motion to dismiss.

The import of these authorities is that a discovery or evidentiary hearing was necessary for the Petitioners to show the actual prejudice to them from the pre-indictment delay, and to show the intentional delay of the Government. No such opportunity was granted.

The indictment charges a conspiracy from January to June of 1972. In late 1972, Kilgore, a Government witness, furnished two investigating officers a written statement about the alleged crime. Before August 1972, Officer Jahnke had the photographs needed and introduced at trial by the Government. The officers knew of the airplane they alleged was used and of its owners. The Government knew all the witnesses they would use at trial by early 1973. The testimony of Government witnesses bears this out. Before trial, grants of immunity were issued to Kilgore and another Government witness. The only tangible results of the delay were additional charges against the two witnesses. These charges against both witnesses were dropped or never prosecuted,

in return for their testimony at trial. Even with immunity, the witness, Porter, was evasive with the Government and appeared to renege on his earlier statement. He was impeached and treated as a hostile witness. Such was the outcome of the Government delay. The Petitioners respectfully suggest that this conduct produced biased testimony to obtain their conviction.

In conclusion, Petitioners argue that the failure of the District Court to afford a hearing to the Petitioners on their motion in order to demonstrate to that court their actual substantial prejudice by the three and one-half year pre-indictment delay, and to elicit from the Government the causes for their delay in bringing the indictment, was reversible error. It is further submitted that a dismissal of the indictment is necessitated by the Government's intentional delay because the delay gave the Government a tactical advantage over the Petitioners and violated their right to due process under the fifth amendment to the United States Constitution.

As this Court stated in Lovasco, supra:

> We . . . leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.

21 Cr. L. Rptr. at 3106. See also United States v. Barket, supra; United States v. Quinn, supra. Petitioners respectfully submit that this requirement was not met when the court denied the Petitioners' motion for an evidentiary hearing and afforded no other opportunity to develop the necessary proof of prejudice and tactical delay.

While the Supreme Court in Marion, supra, dealt with the issues of whether a pre-indictment delay by the Government violated the Due Process Clause when no actual prejudice was "alleged or proved," the Supreme Court has never squarely faced the issue presented here: Whether when there has been a substantial pre-indictment delay and allegations of prejudice and tactical delay, the Due

Process Clause requires that there be an evidentiary hearing or other opportunity afforded to the defendant to present evidence of prejudice and tactical delay and at which time the Government has the affirmative duty to give its reasons for delay. This issue has not been litigated. This issue should be litigated by the nation's highest Court in the interest that an individual's rights under due process should inherently seek a flexible uniform fundamental procedural basis.

2. THE FAILURE OF THE DISTRICT COURT TO GRANT THE PETITIONERS' MOTION FOR A SEVERANCE AFTER THE COURT ADMITTED INTO EVIDENCE MASSLER'S EXHIBIT NO. 1, RESULTED IN THE DENIAL OF PETITIONERS' RIGHT TO A FAIR TRIAL.

The Court of Appeals for the Fifth Circuit recounted the facts surrounding Massler's Exhibit No. 1 in the following manner:

> While Kilgore [the Government's chief witness] was being cross-examined, the Government turned over to the defendants a hand-written statement, prepared

by Kilgore at an undetermined date, which was a summary of the events to which he had testified. The statement related various aspects of the conspiratorial operations. Massler's name did not appear in the account but the names of the other defendants were included. Alvarez had the exhibit marked for identification and cross-examined Kilgore about it, as did Massler's attorney. Several days later, Massler informed the Court that he intended to offer Kilgore's written statement into evidence as exculpating Massler by failure to mention his name. The Court reserved its ruling. After several discussions about the admissibility of the exhibit, the Government withdrew its objections and the statement was admitted, albeit over the objections of the remaining defendants.

> Three questions were raised by these defendants with regard to the admission of this evidence: (A) Whether, in fact, it was admissible; (B) Whether the Court erred in not giving instructions to the jury as to its use, limitations and significance; and (C) Whether the Court erred in denying Alvarez's, Wells', and Rice's motions for severance after the document was admitted.

550 F.2d at 1373.

With regard to these questions, the case of Bruton v. United States, 391 U.S. 123 (1968), appears particularly relevant. There both the petitioner and his co-defendant, Evans, were convicted of robbery. A postal inspector testified that Evans orally confessed to him that Evans and the petitioner committed the crime. This Court held:

> [B]ecause of the substantial risk that the jury, despite

> instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated the petitioner's right of cross examination secured by the Confrontation Clause of the Sixth Amendment.

391 U.S. at 126.

This Court went on to refute the Eighth Circuit's opinion that the admission of the hearsay evidence against the petitioner was cured by the trial court's instruction, noting that the jury would not, in reality, be able to disregard the incriminating evidence as it pertained to the petitioner, regardless of their good intentions to the contrary. Hence, the admission of the hearsay evidence, where the petitioner was not afforded the right of cross-examination, would per se violate his right to confrontation and his right to due process.

The same factors are operative with

respect to Massler's Exhibit No. 1 in the instant case. In effect, the statement is a written summary of witness Kilgore's testimony. It was turned over to defense counsel at trial by the Government. After its admission, it was sent to the jury room without the jury having any evidence of its history nor of any objection thereto. In essence, the jury knew nothing of the document's contents until it was sent to the jury room.

This sequence of events is significant for two reasons. First, the jury had the practical equivalent of the chief Government witness' testimony in front of them. They thus were not forced to rely on recall of Kilgore's testimony. The jury made a request for a transcript of the entire testimony of the trial which was denied, a factor which would, in the mind of the jury, place heavy emphasis on Massler's Exhibit No. 1 which appeared to be a summary of Kilgore's testimony. Although the court, after denying the jury's request for a complete transcript, instructed the jury as to obtaining limited por-

tions of the transcript, the jury already had what appeared to be a summary of Kilgore's testimony without the necessity of calling for the actual transcript of that portion of the testimony, a fact in itself making Kilgore's extrajudicial statement weigh heavy.

The above facts make the instant action strikingly similar to United States v. Brown, 451 F.2d 1231 (5th Cir. 1971). There, the Government was allowed to admit a manila envelope containing upon it a memorandum of the various property contained within the envelope. In reversing the lower court's decision to admit the envelope, the Fifth Circuit stated:

> [T]hus, the jury had before it not only the recollection of the oral testimony given from the stand, but it also had what has been called by the Court of Appeals for the Seventh Circuit in United States v. Ware, (7th Cir. 1957) 247 F.2d 698, "a neat condensation of the Government's whole case against the defendants." The Government's witnesses in effect

> accompanied the jury into the jury room.

451 F.2d at 1234. In the instant case, even though the Kilgore statement was admitted as a prior inconsistent statement and as exculpatory with respect to Petitioners' co-defendant, as a practical matter, the document amounted to sending Kilgore into the jury room with the jury. Because the exhibit was so prejudicial with respect to the Petitioners, and because the jury had no knowledge of the document's origin, Petitioners submit the failure of the District Court to grant the Petitioners' motion for severance was reversible error.

The second reason that the sequence of events is significant is that the District Court failed to give an adequate limiting instruction. The Court of Appeals for the Fifth Circuit found that an adequate instruction was given. (Appendix 39a). However, the instruction which the Fifth Circuit found to be adequate read as follows:

> The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent

with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements. (Appendix 39a).

The preceding instruction was given as a part of the general instruction at the conclusion of the trial, did not refer to Massler's Exhibit,and was intended for Kilgore's prior inconsistent statements relating to a prior trial. (Appendix 39a). Immediately, before giving the above general instruction, the court instructed the jury as to exhibits in the following manner:

> As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Evidence includes the sworn testimony of the witnesses, the exhibits admitted in the record and those stipulations of fact en-

> tered into by counsel during the course of the trial and called by me to your attention. While you are restricted to the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and the evidence in the case. You may also consider either direct, or circumstantial evidence.

The Petitioners respectfully submit alternative arguments. First, because of the unusual circumstances by which the jury obtained the exhibit, the instruction should have specifically referred to the exhibit because the jury had not been previously informed of either the statement's origin or the specific purpose for

which it was admitted. Failure to so refer to the exhibit was so highly prejudicial to the Petitioners as to warrant reversal. Second, under the analysis in Bruton, supra, any limiting instruction would seem insufficient with respect to the Petitioners. In Bruton, this Court noted the practical impossibility of giving an effective limiting instruction when it stated:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of . . . a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

391 U.S. at 126. Because, under Bruton no limiting instruction could adequately protect the Petitioners' interests, they respectfully submit that the denial

of their motions for severance was erroneous and should be reversed.

The Petitioners recognize that, generally, the decision as to whether to grant a severance is within the sound judicial discretion of the trial court. E.g., Barnes v. United States, 127 U.S. App. D.C. 95, 381 F.2d 263 (1967); United States v. Beasley, 519 F.2d 233, rehearing denied, 522 F.2d 1280 (5th Cir. 1975); United States v. Cruz, 536 F.2d 1264 (9th Cir. 1976). However, as the court stated in Flores v. United States, 379 F.2d 905 (5th Cir. 1967), wherein a conviction for possession of a stolen treasury check was reversed because extrajudicial statements made by co-defendant Briones to a federal agent and testified to at trial were sufficiently prejudicial to the defendant Flores so as to require separate trials:

> The potential prejudice to Flores was high; the statement of Briones was direct evidence of knowing possession, and there was no other direct and little circumstantial evidence of Flores' guilt. Under these circumstances, there was

> a high probability that the jury would not "as a practical matter" be able to "keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him."

379 F.2d at 909. Because of the lack of historical background of Massler's Exhibit No. 1, given to the jury in the instant case, they were in the same position as the jury in Flores. For all of the foregoing reasons, it is submitted that the trial court abused its discretion in denying Petitioners' motion for a severance.

Only through a severance could Petitioner have been assured a fair and just trial. To find otherwise, it is submitted, would seem to result in elevating efficiency and administration of justice over the tenets and principles of justice and fair play.

CONCLUSION

Petitioners respectfully urge the Court to hear and resolve the important issue of whether due process requires

that a defendant be entitled to a hearing on a motion for an evidentiary hearing for excessive pre-indictment delay when they allege facts in the motion which show prejudice and tactical advantage. Petitioners additionally respectfully urge the Court to determine whether, under the circumstances, a motion for severance should be granted when documentary evidence introduced by a co-defendant is so highly prejudicial to another co-defendant as to fatally abridge the latter's right to a fair trial.

Respectfully submitted,

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919-273-9457

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari of the Petitioners, Paul Rice and John Leslie Wells, Jr. were served upon the following parties and persons by mailing three copies thereof by first class air mail, postage prepaid to:

1. Robert A.Frazier, Esquire
   Dempsey and Frazier
   Suite 822, Freedom Federal Bldg.
   220 Madison Street
   Tampa, Florida 33602

2. Herman I. Graber, Esquire
   100 Church Street
   New York, New York 10007

3. Milton J. Carp, Esquire
   Special Attorney
   U.S. Department of Justice
   Post Office Box 2799
   Tampa, Florida 33602

4. Solicitor General
   U.S. Department of Justice
   Washington, D.C. 20530

This the 22 day of June, 1977.

Forrest E. Campbell
Counsel for Petitioners

APPENDIX

MASSLER EXHIBIT # 1

STATEMENT OF RANDY KILGORE

November, 1971

Pedro Alvarez came to my house and asked if I would guard some pot for him and Scott, for $500 a week. I took the offer. That night Scott & Pedro picked me up at my apartment on Stroud and we went to a stash house on Wayne Road, off of Gun Highway. I weighed pot and took money while I was there. There were two other people there. Dale Lester and a kid whose name I don't remember from some Bible School in St. Pete. About a week or two after Christmas Pedro and Scott said they would pay me to ride the plane to South America and pick up the next load for them. I went to the Hawaiian Village on Dale Mabry with Paul Rice and John Wells. There we rented two rooms. That night Mike Fink and Mike Durst came to the rooms. We talked for awhile and they left. The next morning at 5:00 a.m. we left the Hawaiian Village and stopped at a convenience sotre for cokes and beer on the corner of Rome and Sligh. From there

we went to Zephryhills Airport.

John and Paul told me they told Pedro he was crazy to rent the plane for $10,000 so now he had bought it for $10,000. We then left for the Bahamas. We stopped at one place in the Bahamas, I think at Inagua. They would not give us fuel for the plane so John or Paul bribed the gas man so he would meet us the next morning. The next morning we left for South America. As we reached South America Paul pointed out Santa Marta on the right beyond some mountains. We flew over some large highway and landed on a dirt runway which was explained to have been built by U.S. Aid bulldozers.

Pedro Devila was there with fuel and pot waiting for us. We fueled the plane. Then I helped load the pot. Pedro Devila had a AR 180 which Alvarez had given him. He had the wrong kind of ammo in it and he thanked me for telling him. He asked if I could get him any fully auto rifles and we talked guns for awhile. We left and headed back to the U.S.

The plane was giving a weird vibration and Paul said one of the props must

have hit a rock while taking off the dirt runway. There were six 55 gal. drums of gas on the plane with a hand pump. Paul said that would allow us to fly back non-stop to Zephyrhills. We landed at Lakeland Airport.

John left the plane to call Zephryhills and see if it was Okay to come on in. He came back to the plane and told us he couldn't get an answer. We left Lakeland and headed for Zephyrhills. Landed and John and Paul left the plane (I will still in it) got in their truck and left. A police car came to the chain at the airport, then he left. Pedro Scott, Mike Sarga, Sparky Yee came up in a Wenaloyd Camper and we unloaded the pot into it. I went in the head car with Pedro and the camper followed us. We went to Rivervieew to Wayne Heckett rented trailer. Unloaded some pot there. Then Scott drove me back to my house.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA v. PEDRO ALVAREZ, et al.	No. 75-181-Cr-T-H Filed in Tampa February 24, 1976

O R D E R

Defendants Rice and Massler have moved to dismiss the indictment on two grounds: (1) the delay of approximately three and one-half years between the offense alleged and the return of the indictment violates their Fifth Amendment right to due process of law; and (2) the attorney who presented evidence to the Grand Jury was not properly empowered to conduct Grand Jury proceedings.

Where, as here, the delay occurs prior to the time that the Defendant is indicted, the statute of limitations is the primary guarantee against the prosecution of overly stale criminal charges (United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971); United States v. Butts, 524 F.2d 975, 977 (5th Cir. 1975).

With respect to the showing required to bar a prosecution on due process grounds because of delay, the test in this Circuit is both stringent and clear: a defendant must show (1) that he suffered"actual prejudice and not merely 'the real possibility of prejudice inherent in any extended delay'" (United States v. McGough, supra, at 604; see also United States v. Butts, supra, at 977), as well as (2) "that the delay was an intentional measure to gain a tactical advantage." (United States v. Butts, supra, at 977).

Since the indictment was returned within the applicable limitations period, (see 18 U.S.C. §3282), Defendants are reduced to the due process claim. In order to meet the first requirement, Defendant Rice cites seizure of records by the Government and that delay has "deprived him of his ability to produce alibi witnesses or otherwise adequately defend himself," while Defendant Massler adds fading memory. Defendant Rice's first claim is covered by Brady v. Maryland, 373 U.S. 83 (1963), and thus

unavailing in this context. With respect to the other claims, "a general allegation of loss of witnesses and failure of memories is insufficient to establish prejudice." (United States v. McGough, 510 F.2d 598, 604 (5th Cir. 1975), quoting United States v. Zane, 489 F.2d 269, 270 (5th Cir. 1973)). Moreover, Defendants' conclusion that the delay must have been caused by a desire to gain a tactical advantage, drawn from the fact of the delay (and certain events) is insufficient to establish that "the delay was an intentional measure to gain a tactical advantage." This case is controlled by United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, wherein the Supreme Court found no due process violation in a 38 month delay, and United States v. McGough, 510 F.2d 598 (5th Cir. 1975), wherein the Fifth Circuit rejected a due process claim founded upon a more concrete showing of actual prejudice than is made here. Accordingly, the motion is DENIED.

As the second ground of their motion to dismiss, Defendants Rice and Massler argue that the evidence leading to their

indictment was presented to the Grand Jury by an unauthorized person. The sufficiency under 28 U.S.C. §515 of the standard letter appointing Strike Force attorneys has been much litigated of late. Although one court has agreed with Defendants, (United States v. Crispino, 392 F. Supp. 764 (S.D. N.Y. 1975) the vast majority of decisions have found the letter sufficient. E.g., United States v. Di Girlomo, 393 F.Supp. 997 (W.D. Mo. 1975); United States v. Weiner, 392 F.Supp. 81 (N.D. Ill. 1975); United States v. Kazonis, 391 F.Supp. 804 (D. Mass. 1975); United States v. Brown, 389 F. Supp. 959 (S.D. N.Y. 1975) (all decided after, and rejecting, Crispino); see also United States v. Gurney, 393 F.Supp. 688 (M.D. Fla. 1974). The Court finds the decisions rejecting Defendant's position more persuasive and, therefore, the motion is DENIED.

Defendants Rice and Massler have also moved for severance. As grounds they cite co-Defendant Alvarez's alleged willingness to testify on their behalf, the possibility of prejudice from evidence

admissible only with respect to other Defendants, and the Government's announced intention to introduce unrelated subsequent acts of co-Defendant Alvarez. With respect to the first two grounds, Defendants' current showing is insufficient. United States v. Diez, 515 F.2d 892, 902-903 (5th Cir. 1975); United States v. Burke, 495 F.2d 1226, 1233-34 (5th Cir. 1974); United States v. McGruder, 514 F.2d 1288 (5th Cir. 1975; United States v. Perez, 489 F.2d 51, 64-67 (5th Cir. 1973); United States v. Lane, 465 F.2d 408, 413-414 (5th Cir. 1972). In light of the prosecutor's announcement that he does "not anticipate the Government attempting to introduce subsequent similar acts testimony involving Defendant Alvarez in the presentation of its case in chief," (see letter filed January 12, 1976) and the continuing nature of a motion for severance, the Defendants' third ground is unavailing at this time. Accordingly, the motion to sever is DENIED, subject to re-examination on the basis of future events.

Defendants Alvarez and Wells have filed a motion pursuant to 18 U.S.C.

§3504. In light of the Government's announcement that there was no electronic surveillance of either Defendant and that it did not obtain any lead by electronic surveillance of either Defendant (see Report and Order on Omnibus Hearing for Defendant Alvarez, filed October 29, 1975, at p. 3; and Report and Order on Omnibus Hearing for Defendant Wells filed November 5, 1975, at p. 3), the Court considers these motions moot.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this _____ day of February, 1976.

_____

UNITED STATES
DISTRICT JUDGE

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

January 7, 1976

Honorable William Terrell Hodges
United States District Judge
Middle District of Florida
Post Office Box 2908
Tampa, Florida 33601

Dear Judge Hodges:

RE: United States v. Pedro Alvarez, et al.
Case No. 75-181-Cr-T-H

After review of the case and a discussion with Special Attorney Rose upon his return from a vacation, I do not anticipate the Government attempting to introduce subsequent similar acts testimony involving Defendant Pedro Alvarez in the presentation of its case in chief.

Sincerely yours,

L. Eades Houge
Special Attorney
Tampa Field Office

cc Arnold D. Levine, Esq.
Herman I. Graber, Esq.
Forrest Campbell, Esq.

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

PAUL RICE,
PEDRO ALVAREZ,
JOHN LESLIE WELLS, JR.,
and
JEROLD MASSLER,
Defendants-Appellants

No. 76-2477

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

April 20, 1977

I. FACTS

The Government's case depended in the main on the testimony of William Kilgore, an unindicted co-conspirator, in protective custody, who appeared under grant of "informal" immunity.

Kilgore's Testimony

Kilgore first met Alvarez in 1968 or 1969. In February, 1972, Alvarez hired Kilgore to guard a cache of marijuana located in "Stash House No. 1" in Odessa, Florida. For three weeks, Kilgore was paid to guard the contraband, to weigh it for customers, and collect for it. Alvarez told Kilgore that the marijuana, stored in bales and burlap sacks, came from Columbia, South America.

Later on in February, Alvarez took Kilgore to Mike Sarga's "Stash House No. 2," in the same vicinity, where he did similar work.

In March, Kilgore and Alvarez flew to New York. After arrival, Kilgore went with Allen Jacobs to Woodstock to guard a stash house located there. Sarga and Massler soon drove up in a van with a boat on top. The boat contained 350 pounds of marijuana. The next day, Alvarez directed Kilgore to let Jacobs and Massler have 100 pounds each, on consignment. Later, Alvarez directed Sarga and Kilgore to transfer the re-

mainder of the marijuana to Massler in Manhattan. Kilgore stayed in New York about a week and collected $120,000 from Jacobs and Massler, owed Alvarez for the pot. Kilgore then returned to Tampa and turned the money over to Alvarez.

Around the first of April, Alvarez contacted Kilgore again and asked him if he would like to go to Columbia and guard a return load of marijuana. Kilgore was also to pay the Columbia connection, Pedro and Alberto Davilla. He was to fly down on a DC-3, piloted by Wells and Rice and was to be paid $5,000 for his part in the trip. Alvarez drove Kilgore to the Hawaiian Village Motel where Kilgore met Rice and Wells. Rice there stated that Alvarez had paid $10,000 to rent the plane for a prior trip and had then bought the plane for $10,000. Rice and Wells related to Kilgore an account of a prior similar trip to Columbia on which Alvarez had accompanied them. Alvarez had also told Kilgore of the prior trip, saying that

the marijuana at "Stash House No. 1" had been obtained at that time.

The next day, Kilgore, Rice and Wells flew to a location south of Bogota, Columbia. Once there, the defendants gave the Columbians the money and certain other items and loaded 3,500 pounds of marijuana on the plane.

On return to the United States, they loaded first at Lakeland, then returned to Zephyrhills. Once they landed, Alvarez and two others arrived in a Winnebago, into which they loaded the marijuana. From there, the party went to a house in Riverview and distributed part of the marijuana.

Subsequently, Alvarez again contacted Kilgore and asked him if he'd like to make a second trip to Columbia. A couple of weeks later, Alvarez approached Kilgore about making another trip to New York to collect money from Massler. Kilgore made this trip around the end of Arpil 1972, but returned to Tampa without the money. Massler followed a few days later and paid Alvarez in excess of $100,000.

Kilgore's testimony was supported by other items of evidence adduced by the Government. Much of the conspiratorial activities had been recorded on film. One of the defendants had taken several hundred photos of the operation. Negatives of these photographs were volunteered to the law enforcement officers by the manager of the photography department at J.C. Penney's, who discovered the contents by chance.

The manager of the Hawaiian Village Motel corroborated Kilgore's account of the stay at the motel, although his testimony did differ in some aspects.

Lastly, one Porter reluctantly testified that Rice discussed with him the possibility of using one of Porter's airplanes for importing marijuana, that Rice leased a Douglas DC-3, and Wells had signed the agreement as a witness. He stated that sometime in April 1972, he sold the craft to Rice and Wells. Porter once saw Rice and several other individuals unloading several dark,

big, square parcels from the plane. He also saw a late night operation in April or May of 1972, in which a DC-3 landed, a vehicle approached the plane, and the vehicle left. Additionally, Porter testified that Rice and Wells made inquiries of him as to how to arrange additional fuel sources for the DC-3.

This array of evidence, accepted by the jury as being true beyond a reasonable doubt, reduces the appellants to a many sided attack on various aspects of the trial.

II. APPELLATE CONTENTIONS

A. Massler, Alvarez, Wells, and Rice

1. Pre-Indictment Delay

There was a three and one-half year delay between the close of the alleged criminal activities and the return of the indictment. It is argued that this unconstitutionally prejudiced the defense and that by not holding an evidentiary hearing to determine the cause for the delay the District Court reversibly erred.

The defendants complained generally that due to the delay, possible witnesses were either "unremembered or unavailable", that the delay severely prejudiced the defense, and that it was intended to give the govnerment a tactical advantage over the defendants, that is, to enable the government to procure evidence of subsequent criminal acts of some co-defendants to bolser the prosecution of all.

No such later acquired evidence was ever offered against any of the defendants. No list of unavailable witnesses was tendered, nor was there any recitation of any exculpatory testimony thus put beyond the reach of the defense.

The Supreme Court has held that the applicable statute of limitations is the primary, but not the sole, guarantee against the bringing of overly stale criminal charges; that one seeking to establish impermissible indictment delay under the Due Process Clause must show substantial actual prejudice resulting from the dealy or that the delay was an intentional measure designed to gain a tactical advantage for the prosecution. Absent such a showing no Constituional violation has been inflicted and the indictment need not be dismissed. See United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L.Ed.2d 468 (1971). The Sixth Amendment right to speedy trial arises only when a defendant becomes an accused,either through arrest, indictment, or information. See United States v. Marion, supra; United States v. Harrington, 5 Cir. 1976, 543 F.2d 1151; United States v. Davis, 5 Cir. 1973, 487 F.2d 112, 116, cert. den., 1974, 415 U.S. 981, 94 S. Ct. 1573, 39 L.Ed.3d 878; United States v. Broadway, 5 Cir. 1973, 477 F.2d 991, 996.

Speculative assertions, such as allegations of lost witnesses, ensuing indi-

gency, failure of memory, and general inability to defend oneself due to the delay, fall short of the Marion standard, United States v. Butts, 5 Cir. 1975, 524 F.2d 975, 977; United States v. McGough, 5 Cir. 1975, 510 F.2d 598, 604; United States v. Broadway, 5 Cir. 1973, 477 F.2d 991.

An evaluation of this appellate record in the light of the foregoing considerations shrinks the complaint about pre-indictment delay to nothing more than a complaint. There was no showing of actual prejudice. The contention fell so far short of Marion standards and our own decisions on the subject that it was without substance. The denial of an evidentiary hearing on the matter was not erroneous.

2. Severance

Various notions for severance were grounded on an expressed desire to call one co-defendant or another as a witness on behalf of the respective movants.

In our previous decisions we have clearly delineated what must be shown to warrant granting a motion to sever under

the circumstances present here. The movant must demonstrate:

(1) bona fide need for the testimony;
(2) the substance of the desired testimony;
(3) its exculpatory nature and effect; and
(4) that the designated co-defendant will in fact testify at a separate trial.

United States v. Morrow, 5 Cir. 1976, 537 F.2d 120, 135; United States v. Diez, 5 Cir. 1975, 515F.3d 892, 903, cert. den. 423 U.S. 1052, 96 S. Ct. 780, 46 L.Ed.2d 641 (1976); United States v. Burke, 5 Cir. 1974, 495 F.2d 1226, 1234; United States v. Martinez, 5 Cir. 1973, 486 F.2d 15, 22; Byrd v. Wainwright, 5 Cir. 1970, 428 F.2d 1017, 1019-1022.

The trial court should

(1) examine the significance of the alleged exculpatory testimony in relation to the defendants' theory of defense;
(2) assess the extent to which the defendant might be prejudiced by the absence of the testimony.

(3) pay close attention to judicial administration and economy; and
(4) give weight to the timeliness of the motion.

Id.

Massler moved pretrial for a severance predicated on Rule 14, Fed. R. Crim. P.[1] He asserted that while co-defendant Alvarez would not testify in his behalf at a joint trial he would do so if there was a severance. The motion stated:

> In the instant case, Pedro Alvarez has stated, and he will so depose if requested, that if called at a separate trial where he will not need to

1. Rule 14 provides:

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

exercise a Fifth Amendment privilege, he will and can give evidence that will exonerate Jerrold Massler completely. If tried jointly,Mr. Alvarez will, of course, not testify.

This motion did not state what Alvarez would, in fact, testify to. Whatever the testimony, it was contingent upon Alvarez not being required to testify to anything which might tend to incriminate him.

The denial of the motion in this form was not error.

When the trial day came Massler renewed his motion. Other defendants decided that they would attempt to board the same train. Alvarez indicated that he wanted to call Massler as a witness. Wells said that he desired to call one or more of the co-defendants as his witnesses.

Alvarez told the Court that he planned to call Massler as his first witnesses. He stated that he would prove by Massler that Massler was in jail in the latter part of April, 1972, contradicting the testimony of Kilgore that he met Massler in Tampe in late April. If Mas-

sler was in jail in late April there should have been records to prove it without the necessity of calling Massler to the stand. Massler's attorney stated that his client would be willing to testify if "he could no longer br prosecuted for the events contained within this indictment", which amounted to nothing more than a suggestion that Massler would testify on his own terms, a grant of immunity from prosecution. The denial of Alvarez's motion was entirely in order.

Later in the trial, Massler's attorney told the Court that he wanted to call Alvarez as a witness. He stated that Alvarex would testify that he never received $200,000 from Massler as Kilgore testified, "and that he would exclupate my client in terms of this particular conspiracy". It was stated that Alvarez would not testify as a defendant but he would testify in a separare proceeding where his guilt or innocence was not on the line.

During the same conference, Rice's attorney stated that he wanted to call Massler as a witness. He stated that

Massler would testify that "he was not acquainted with my client during the period of time alleged in the conspiracy". Here it is to be noted that the government never claimed that Massler had any contact with Rice. Rice dealt with Alvarez.

Wells' attorney informed the Court that he desired to call Alvarez to testify as to the factual setting for two photographs depicting Wells and Alvarez in an airplane. This testimony would have been that the picture depicted a legitimate charter flight on which Alvarez hired Wells to fly him to the Bahamas. Wells' attorney stated that "that would be all I would ask Mr. Alvarez concerning his relationship with Mr. Wells. I think it highly probative." It was stated that Alvarez would testify ina proceeding where his guilt or innocence was not being determined.

Some of the motions were not made until the eleventh day of a twelve day trial.

For lack of any reasonable certainty that the proposed witnesses would, in

fact, testify; for lack of relevance; for lack of requisite exculpatory showing; and for lack of timeliness, we hold that the defendants were not prejudiced by the denial of the severally requested severances. The denials did not amount to reversible error.

3. Cross Examination

The appellants complain of being prohibited "from cross-examining Kilgore about his protected custody over a five month period and his activities during that time". The Court ruled:

> [N]o one shall seek to elicit from the witness that he is in protective custody as a result of any specific fear of harm at the hands of the defendant Alvarez
>
> . . .
>
> * * * * * *
>
> [T]he Court will direct counsel not to maky inquiry as to the precice nature of the witness' present employment.

The Court specifically informed counsel, however, that they could inquire as to the fact that Kilgore was in protective custody, whether he was receiving

payments from the government, whether he was gainfully employed, and what income he had. Counsel for Massler replied that he had no desire to find out where Kilgore was working or living.

Although generally there is a right to inquire into a witness's background and environment in order to place the witness in his proper setting, Alford v. United States, 282 U.S. 687, 692, 51 S. Ct. 218, 75 L.Ed. 624 (1931), there are limtations. As Alford recognizes,

> There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him.
>
> Id. 282 U.S. at 694, 51 S. Ct. at 290.

In Smith v. Illinois, 390 U.S. 129, 133-134, 88 S. Ct. 748, 751, 19 L.Ed.2d 956 (1968), Mr. Justice White, concurring, stated that in addition to those exceptions noted in Alford, he "would place in the same category those inquiries which tend to endanger the personal safety of the witness." We have followed this exception. See United States v. Alston, 5

Cir. 1972, 460 F.2d 48, and United States v. McKinley, 5 Cir. 1974, 493 F.2d 547.

While maintaining a due regard for the constitutional right of confrontation, "the scope and extent of cross-examination is generally declared to be within the sound discretion of the trial court" and will not be interfered with absent an abuse of that discretion. United States v. Brown, 5 Cir. 1977, 546 F.2d 166, 169; Grant v. United States, 5 Cir. 1966, 368 F.2d 658. 661. Of course, when it is the "star" witness who is being cross-examined, or when he was "an accomplish or participant in the crime for which the defendant is being prosecuted, the importance of cross-examination is necessarily magnified." United States v. Brown, supra, 546 F.2d at 170; Beaudine v. United States, 5 Cir. 1966, 368 F.2d 417, 424.

At an in camera conference the government informed the Court that any inquiry into the nature of Kilgore's work would readily reveal where he was working and would endanger him. We have no transcript of what occurred at the hearing but we have no difficulty in per-

ceiving, viewing the record as a whole, that there was a reasonable necessity for not revealing where Kilgore lived and worked when the case came to trial. That he was in protective custody was revealed.

The defendants also complain of being prohibited from asking Kilgore the circumstances surrounding his discharge from the military, certain aspects concerning an arrest for possession of heroin in 1973, and questions concerning trips by him to New York and to Miami.

We have looked carefully at the numerous evidentiary exceptions raised by appellants but the totality of the matter is that Kilgore was subjected for several days to rigorous cross examination, which developed many facts which might have discredited his testimony on direct. We conclude that there was no transgression of Sixth Amendment rights. See, in particular, Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974).

4. Rule 404(b)

Kilgore testified that he knew Alvarez and pointed him out in court. He said he first met Alvarez in 1968 or 1969.

The government admitted that it knew what the answer was going to be when it thereafter asked Kilgore the following question:

> "Sir, what association, if any, did you have with Mr. Alvarez once you all met?"

There was an objection that any relationship prior to the inception of the conspiracy on January 1, 1972, was irrelevant and immaterial. Defense counsel pointed out that Kilgore "says he knows him." The objection was overruled on the ground that the jury would be instructed as to the time period charged in the indictment and that the relationship prior to that time "could be relevant with respect to the state of mind, or behavior of the subject in explaining whatever he says explains subsequently of himself of the defendant".

Kilgore than responded, "We used to trade guns for dope and—".

The defense then moved for a mistrial.

There was a protracted conference in the absence of the jury. The govern-

ment said that the proof was offered to show that this prior association was what prompted Alvarez to trust Kilgore with guarding the marijuana and collecting for it.

The prosecution further proffered that when Kilgore said "dope", he was referring to marijuana. The Judge asked Kilgore what he meant and Kilgore replied "marijuana and hasish." After this lengthy discussion, the Court determined that the statement was admissible under 404(b) of the Federal Rules of Evidence.

Once the jury returned, Kilgore testified what he meant by the word "dope". The Judge instructed the jury that Kilgore's statement should be considered only with respect to Alvarez and the statement should "receive only such weight as you may think it entitled to receive in relation to all of the other testimony and evidence" adduced at trial.

Rule 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the

> character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have recently analyzed this rule in United States v. Bloom, 5 Cir. 1976, 538 F.2d 704. Noting that it coincides with existing case law in this Circuit, Id, at 708, we stated that, "evidence of acts extrinsic to the crime charged is admissible under the itemized exceptions once the trial court is satisfied that certain threshold prerequisites have been met." Id. at 708. These prerequisites are:

> (1). Proof of the prior similar offenses must be "plain, clear and convincing;"
>
> (2). The offenses must not be too remote in time to the alleged crime;
>
> (3). The element of the prior crime for which there is a recognized exception to the general rule,such as intent, must be a material issue in the instant

case;

(4). There must be a substantial need for the probative value of the evidence provided for by the prior crimes.

Id. at 708 (emphasis in original).

Without commenting on the first three criteria, we feel it is clear that the disputed statement fails to pass criterion number four. There was no need for the evidence in the form rendered. Kilgore had stated that he had known Alvarez since 1968 or 1968 and had pointed him out in court. Any need for evidence to establish the manner in which Kilgore and Alvarez met could have been accomplished without mentioning "trading guns". The government's deliberate interjection of this testimony exhibits lack of the appropriate sensitivity to the defendants' substantive rights. We expressly disapprove it.

Nevertheless, we are convinced that the error was harmless beyond a reasonable doubt. The evidence of defendants' guilt was abundant; the trial lasted twelve days; fourteen witnesses were heard. We

are persuaded, therefore, that this one statement in such a massive trial could not have possibly influenced the jury to reach an improper verdict.

In United States v. Resnick, 5 Cir. 1974, 488 F.2d 1165, cert. den., 416 U.S. 991, 94 S. Ct. 2400, 40 L.Ed.2d 769, the defendant was charged with selling firearms to nonresidents and failing to keep appropriate firearms transaction records. An A.T.F. agent testified to certain unrelated criminal activity, namely that the defendant dealt in stolen guns and participated in the unlawful alteration of semi-automatic weapons to fully automatic ones. Defense counsel moved for a mistrial, which was denied. The trial court stated that it would instruct the jury to disregard the tainted testimony. The District Court, however, did not give the promised curative instructions. Further, at the post-instruction conference, defendant's attorney stated that he had no objections to the charges given.

In holding that the error was harmless, we said:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand. . . ."

Kotteakos v. United States, 1946, 328 U.S. 750, 764, 66 S. Ct. 1239, 1248, 90 L.Ed. 1557; F.R.Crim.P. 52(a). In the circumstances of this case, we are convinced that the substantial rights of Resnick were not affected.

> "[W]e have carefully canvassed the entire record and transcript, and are convinced that no prejudice resulted in any wise affecting the verdict of the jury. The evidence of defendant's guilt is strong, clear and convincing beyond question."

Id. at 1168.

See also United States v. Beasley, 5 Cir. 1977, 545 F.2d 403; United States v. Bloom, supra; United States v. Barnett, 5 Cir. 1974, 492 F.2d 790; United States v. Harbolt, 5 Cir. 1974, 491 F.2d 78; United States v. Roland, 5 Cir. 1971, 449 F.2d 1281.

As in Resnick, supra, the District Court herein specifically asked counsel

for Alvarez if he desired an instruction relating to the disputed statement, stating that it would be willing to give a limiting instruction if one was requested. Counsel for Alvarez declined the offer.

In view of the instructions as to the other defendants given at the time the statement was admitted, it was not error to deny a mistrail as to them. United States v. Davis, 5 Cir. 1977, 546 F.2d 617, 620.

III. ALVAREZ, WELLS, AND RICE

1. Masslers Exhibit No. One

While Kilgore was being cross-examined, the government turned over to the defendants a hand-written statement, prepared by Kilgore at an undetermined date, which was a summary of the events to which he had testified. The statement related various aspects of the conspiratorial operations. Massler's name did not appear in the account but the names of the other defendants were included.

Alvarez had the exhibit marked for identification and cross-examined Kilgore about it, as did Massler's attorney. Sev-

ral days later, Massler informed the Court that he intended to offer Kilgore's written statement into evidence as exculpating Massler by failure to mention his name. The Court reserved its ruling. After several discussions about the admissibility of the exhibit, the government withdrew its objections and the statement was admitted, albeit over the objections of the remaining defendants.

Three questions were raised by these defendants with regard to the admission of this evidence:

(A) Whether, in fact, it was admissible;

(B) Whether the Court erred in not giving instructions to the jury as to its use, limitations, and significance; and

(C) Whether the Court erred in denying Alvarez's. Wells', and Rice's motions for severance after the document was admitted.

In admitting "Massler's Exhibit No. One", the Court stated that it was allowing it in under 613(b) Fed. R. Evid. because of its inconsistency with portions

of Kilgore's testimony, because Kilgore had been cross-examined at length concerning the exhibit, and because the government objections to its introductions had been withdrawn.

Rule 613(b) provides:

> Extrinsic evidence of a prior incinsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

This rule establishes three criteria which must be met before the statement is admissible:

(1) It must be a prior inconsistent statement of the witness;

(2) The witness must be afforded an opportunity to explain or deny the statement; and

(3) The opposing party must be afforded an opportunity to interrogate

the witness concerning the statement.

All three elements are present here.

Defendants complain that no limiting instruction was given and, that under our previous decisions, this was error. See United States v. Sisto, 5 Cir. 1976, 534 F.2d 616; United States v. Garcia, 5 Cir. 1976, 530 F.2d 650; Slade v. United States, 5 Cir. 1959, 267 F.2d 834.

The fact is that a limiting instruction was given. The Court told the jury:

> The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements. (Emphasis added).

The Court then instructed the jury on the effect of impeachment through such statements.

Denying the severance requested by the other defendants was not error.

United States v. Maddox, 5 Cir. 1974, 492 F.2d 104, 106, cert. den. 419 U.S. 851, 95 S. Ct. 92, 42 L.Ed.2d 82 (1974); United States v. Johnson, 5 Cir. 1973, 478 F.2d 1129, 1131, n. 3; United States v. Harris, 5 Cir. 1972, 458 F.2d 670, 673, cert. den. 409 U.S. 888, 93. S. Ct. 195, 34 L.Ed.2d 145 (1972); United States v. Levrie, 5 Cir. 1971, 445 F.2d 429, 431; James v. United States, 5 Cir. 1969, 416 F.2d 467, 475.

2. Witness Interview

The defendants urge that the District Court erred by refusing to compel Kilgore to submit to an interview by defense counsel. As the result of a motion by the defendants, the government made Kilgore available to the defendants for an interview. Kilgore, however, refused to answer any questions about the case. Both before and during trial, the District Court interviewed Kilgore concerning his refusal to talk with defense counsel. There is no indication that the government was responsible for Kilgore's attitude. To the contrary, Kilgore told the Court that the government had told him that he could talk to defense counsel and that the matter was

strictly up to him. All that a defendant is entitled to is access to a prospective witness. This right, however, exists co-equally with the witnesses' right to refuse to say anything. United States v. Dryden, 5 Cir. 1970, 423 F.2d 1175, 1177, cert. den. 398 U.S. 950, 90 S. Ct. 1869, 26 L.Ed.2d 290 (1970). "A government witness who does not wish to speak to or be interviewed by the defense prior to trial may not be required to do so." United States v. Benson, 5 Cir. 1974, 495 F.2d 475, 479.

IV. MASSLER

Inquiry by Jury

After one hour of deliberation, the jury sent the Court a written message requesting "all transcripts now available in written form". The Court discussed how it planned to handle the request and there was no objection. The jurors were called back and the Court advised them:

> Now if you do have, or if you should have during your deliberation some particular or narrow question, so-to-speak with respect to an item, or items of testimony you, of course,

> may request it in a written message . . . and I will give consideration to that. . . . But, in all events, a broad request such as you have made here for all available transcripts cannot be granted by me under prevailing policy and rules, and I trust you will understand that.

No objections were made at this time either.

The discretion of the trial judge in ruling on jury requests of this nature is broad, see, e.g., Government of the Canal Zone v. Scott, 5 Cir. 1974, 502 F.2d 566; United States v. Braxton, 5 Cir. 1969, 417 F.2d 878; Pinckney v. United States, 5 Cir. 1965, 352 F.2d 69.

In United States v. Morrow, 5 Cir. 1976, 537 F.2d 120, 148, we held that the trial court did not abuse its discretion in denying the jury's request for over 300 pages of transcript. We stated: "The possibility of undue emphasis by the jury on a small part of the testimony given in the six week trial of this case amply justified the district court's denial of the jury request." Id. at 148.

The jury's request herein could con-

ceivably have meant the transmittal to them of over 2000 pages of transcript. Tgere was no abuse in denying that request.

V. OTHER ASSERTED ERRORS

In addition to the points hereinabove discussed, the appellants claim errors as to alleged Bruton rights, that they were prosecuted for a multiple conspiracy, that they were improperly denied an opportunity to take the deposition of two Columbian nationals in Columbia, that they were erroneously denied an opportunity to attack the reliability of certain photographic evidence, that the evidence was insufficient to support Rice's conviction, that the trial judge displayed improper irritation with the witness Porter, and that the jury was not fully instructed as to the testimony of accomplices. They also complain of the differences in the sentences imposed on the several defendants.

A searching evaluation of these contentions reveals that lack of merit. We see no benefit to be had by unnecessarily prolonging this opinion with an extended

discussion of these matters.

CONCLUSION

The record in this appeal reveals that the appellants were bereft of a defense on the facts. Accordingly, defense counsel retreated to the only hope left- an able, ingenious, persistent attack on trial procedures. They are to be complimented for their efforts, but the convictions must stand unreversed.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA - TAMPA x

UNITED STATES OF AMERICA

-against-

JEROLD MARTIN MASSLER, et al.,

Defendants.

x

NOTICE OF MOTION
75-181-CR-I-H
FILED: November 19, 1975
Tampa, Florida

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of HERMAN I. GRABER, attorney for the defendant, dated the 18th day of November, 1975, the defendant will move this Court for an order dismissing the indictment pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure as having been delayed for a period of three and one half years in violation of the Fifth and Sixth Amendments of the United States Constitution.

Alternatively, it is requested that a hearing be held as to the reasonableness and result of such delay.

Dated: New York, New York
November 18, 1975

Yours, etc.,

SIEGEL & GRABER, ESQS.
Attorneys for Defendant Massler
100 Church Street
18th Floor
New York, New York
10007
(212) 962-1295

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA - TAMPA

UNITED STATES OF AMERICA

-against-

AFFIDAVIT
75-181-CR-I-H

JEROLD MARTIN MASSLER, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HERMAN I. GRABER, being duly sworn, deposes and says:

That I am the attorney for the defendant JEROLD MASSLER in the above-captioned matter and submit this afidavit for a dismissal of the indictment.

Upon information and belief, defendant MASSLER is unable to contribute to his defense in any meaningful way due to pre-arrest delay. Having interviewed him extensively, as well as persons with whom he was associated at the time, the dates of the alleged criminal activity merge into the indistinguishable past.

As a result, possible witnesses who could support a defense of entrapment, or mere association, are either unremembered or unavailable.

Upon information and belief, this delay has resulted in such damage to the defense that the guarantee of an accurate fact finding by adversary contest at trial would be violated.

Upon information and belief, the defendant MASSLER was at no time unavailable to federal prosecution. He was not a fugitive. He voluntarily surrendered to this indictment. The delay of over three months by the law enforcement officials was unreasonable and had no basis in necessity vis a vis defendant MASSLER.

WHEREFORE, it is respectfully requested that the within motion be granted.

HERMAN I. GRABER

Sworn to before me this
18th day of November, 1975

_____
NOTARY PUBLIC

POINT I

AN EVIDENTIARY HEARING SHOULD BE HELD TO DETERMINE WHETHER THE INDICTMENT SHOULD BE DISMISSED

The legal basis for an inquiry into pre-arrest delay is the United States Supreme Court decision in United States v. Marion, supra. The Court there specifically held that the Sixth Amendment right to speedy trial does not attach before an arrest. The primary safeguard of a defendant's right to be free of stale prosecution is the statute of limitations, which reflects the legislative assessment of protection of the interests of the State with regard to timely arrests. However, the Court went on to adopt what today is considered the more enlightened view, that the statute of limitations does "not fully define. . . rights with respect to the events occurring prior to indictment." 404 U.S. at 324. They called upon the Courts to use a delicate balancing of judgment to decide in what circumstances the rights of a defendant to a fair trial were prejudiced by delay to the extent that such

breached the integrity of the fact finding process. Where such due process was judged lacking, there should be a dismissal of the prosecution. 404 U.S. at 325.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	MOTION TO DISMISS
	)	75-181-Cr-T-H
PAUL RICE, et al.	)	FILED: 5 January, 1976
		Tampa, Florida

I am the attorney for the defendant Paul Rice and I renew his motion for dismissal under Rule 48(b) of the Federal Rules of Criminal Procedure.

In support of this motion to dismiss the defendant argues that the pre-indictment delay of nearly three and one-half years has severely prejudiced his defense and that such delay by the Government has been intentional to gain a tactical advantage over the defendant.

The defendant Paul Rice argues that his right to due process has been violated, in that the pre-indictment delay has deprived him of the ability to produce an adequate defense of his innocence. It has deprived him of his ability to produce aliby witnesses or otherwise adequately defend himself.

This indictment covers nearly six months time and is vague in references to persons, places and times. This is particularly important in light of the Government's obstinate refusal to provide a bill of particulars, to provide information about their alleged informers or protected witnesses, or other meaningful discovery. The defendant is severely hampered in preparing a defense to the indictment.

The defendant is informed that records and files of the Zephur Hills Airport were seized by the Government nearly three years ago and are not available to the defendant to prepare his defense to this action. The defendant argues that such records are or may be essential to his defense and that failure to have them is severely prejudicial to him.

In support of his argument that the pre-indictment delay has been intentional by the Government to gain a tactical advantage over the defendant, the defendant argues as follows:

First, all the essential informa-

tion and witnesses for an indictment were known to the Government sometime near the end of 1972 and early 1973.

Second, the Government waited until about May, 1975, to bring its information to the Federal Grand Jury and further delayed seeking an indictment until October, 1975.

Third, this delay has been intentional on behalf of the Government to procure evidence of subsequent alleged acts of some co-defendant and for alleged criminal acts of some co-defendants, other than the defendant Paul Rice. This was done to bolster its prosecution of all co-defendants.

Fourth, the Government has stated its intention to offer and introduce the alleged subsequent acts of the co-defendant Alvarez into evidence in this action. The witness list offered by the Government and the expression of this intention by the Special Attorney for the Government further demonstrates that the Government's intention in the delay of the indictment was for the Governor to gain an advantage. These subsequent acts of

the co-defendant Alvarez are:

The first subsequent act of the defendant Alvarez is an alleged meeting between the co-defendant Alvarez and the co-defendant Mock (who has not been arrested) at the Warwick Hotel in New York City on or about November 22, 1973. This was seventeen months subsequent to the alleged conspiracy. It will consist of records of numerous telephone calls made to and by them. Copies of room registrations and telephone calls have been furnished to the defendant by the Government.

The subsequent act of the defendant Alvarez is an alleged meeting between the defendant Alvarez and the defendant Mock at the Warwick Hotel in New York City on or about December 17, 1973. This was eighteen months subsequent to the alleged conspiracy. It will consist of records of numerous telephone calls made to and by them. Copies of the room registrations and telephone calls have been furnished to the defendant by the Government. The Government has listed as a witness the custodian of Records at the Warwick Hotel in New York City.

The third subsequent act of the defendant Alvarez which the Government states that it will offer and introduce into evidence is an incident involving the defendant Alvarez wherein he, as a central figure, has been indicted for the importation of approximately eighteen tons of marijuana during the late summer of 1975. The action is now pending in the Federal District Court for the Southern District of Georgia. This act is approximately three and one-half years subsequent to the alleged conspiracy. In the case of witnesses presented to the defendant, the Government has listed Agent Thomas C. Sprague of the Drug Enforcement Agency in Savannah, Georgia.

In Marion v. United States, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971), the Court made it clear that "Invocation of the speedy trial procisions thus need not await indictment, information or other formal charge." The court noting that the indictment was brought within the statute of limitations stated:

> Nevertheless, since a criminal trial is the likely consequence

of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

The court is urged to examine the conduct of the Government in its pre-indictment delay and assess the factors of the length of and the reasons for the delay. Also, examine the defendant's assertion of his rights and prejudice to him. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101

(1972).

The Government has caused delay after delay in securing an indictment and such delays have been unnecessary, excessively long, prejudicial to the defendant, violated due process and was intentional for the Government's own advantage over the defendant. For the reasons set forth the indictment should be dismissed.

Respectfully submitted this 29 day of December 1975.

Forrest E. Campbell
Attorney for Paul Rice
319 Southeastern Bldg.
Greensboro, N.C. 27401
919-273-9457

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, :
Plantiff, :Case No.
vs. 75-181-CR-T-H
PEDRO ALVAREZ, et al., :Filed:
Defendants. :March 1, 1976

MOTION FOR EVIDENTIARY HEARING
AND TO LIMIT GOVERNMENT'S PROOF

Defendants, Alvarez and Massler, by their undersigned attorneys, and Defendants, Wells and Rice, by their undersigned attorneys, file this Motion and state as follows:

1. The Defendants, Wells and Rice, submit that the Government's witness, Kilgore, will attempt to identify them as one of the pilots on a plane that flew to Columbia in connection with the conspiracy charged herein.

2. The Defendants, Alvarez and Massler, submit that the witness, Kilgore,

will attempt to identify them as one of the parties to the conspiracy charged herein.

3. In a trial before Honorable Ben Krentzman, in the case of U.S.A. v. Fink, et al., Case Number 73-69, the witness, Kilgore, on cross examination was asked questions about the conspiracy charged herein, copies of the pertinent pages of the transcript relating thereto are annexed hereto as Exhibit "A" and made a part hereof for all purposes.

4. The witness, Kilgore, in response to a question regarding the two pilots on the plane, stated as follows:

"Q Who went down with you on that trip?

A Just the two pilots.

Q Do you know their names?

A I could recall their names if I heard them, but I don't know them."

5. As it related to the people who were involved in the conspiracy prior to the one on trial that occurred in November and December, 1972, and more particularly, the conspiracy that is the subject

matter of the Indictment herein, the witness, Kilgore, was questioned as follows and answered as hereinafter set forth:

"Q All right. Now John Geders was not in on that smuggling escapade with you, was he?

A Sir, I didn't know who all was in on that escapade.

Q Approximately when did that occur?

A A few months before ours.?

6. In light of the foregoing, and in light of the fact that the witness, Kilgore, has for some period of time been in "protected custody" and has been discussing the circumstances of this Indictment with Government agents, employees and attorneys and has refused to discuss this matter with defense counsel, the Defendants submit that any identification of them either as pilot or participant in this scheme would have resulted from an impermissibly suggestive contact and relationship between the Government's agents, employees and attorneys and the witness.

WHEREFORE, Defendants pray that this Court have an evidentiary hearing in regard to the foregoing and limit and restrict the Government's proof as the consequence thereof.

MEMORANDUM IN SUPPORT OF MOTION

In support of the aforesaid Motion, the Defendants would rely upon the Suppression Order entered by this Court in the case of U.S.A. v. William R. Bland, 73-143-CR-T-H.

_____

Arnold D. Levine, Esquire
Attorneys for Pedro Alvarez

_____

Forest Campbell, Esquire
Attorney for Paul Rice

_____

Rick B. Levinson, Esquire
Attorneys for John Wells

_____

Herman Graber, Esquire
Attorney for Gerald Massler

A No, sir, we stopped at another place in the Bahamas; then Inagua; then Colombia, South America.

Q All right. And you delivered those guns to whom down in South America?

A Pedro Devila.

Q Sir?

A Pedro Devila.

THE REPORTER: How do you spell his last name?

THE WITNESS: I don't know how to spell his last name.

BY MR. RINEHART:

Q If you will pronounce it a little bit slower maybe we can pick it up.

THE WITNESS: Devila.

Q Devila?

A Devila.

Q All right, then did you bring

anything back? On the return trip?

A We brought pot back.

Q How much pot did you bring back?

A 3,500 pounds.

Q Now did you stop at Inagua on the way back up?

A On the way back up? Or back?

Q On the way back up to the United States from Colombia?

A No, it was non-stop.

Q Then how were you able to manage to fly non-stop from Colombia up to - - where? Tampa?

A Yes, sir.

Q Non-stop?

A I didn't fly; but the pilots put six 55-gallon drums of extra fuel on the plane.

Q I'm sorry?

A The pilots had put six 55-gallon drums.

Q All right.

A On the plane.

Q Who went down with you on that trip?

A Just the two pilots.

Q Do you know their names?

A I could recall their names if I heard them, but I don't know them.

Q all right. Now John Geders was not in on that smuggling escapade with you, was he?

A Sir, I didn't know who all was in on that escapade.

Q Approximately when did that occur?

A A few months before ours.

Q A few months before the November trip? is that correct?

A Yes.

Q Could that have been somewhere in the early summer of 1972?

A That may have even been prior to that.

Q All right. Now, how much money did you realize off of that particular smuggling operation?

A About $5,000.

Q Now you mentioned that you had been involved in several smuggling episodes. When was the other one prior to that?

A Just two.

Q Just two? Two including the one in November?

A Yes, sir.

Q Were you also involved in the movement of a large amount of marijuana from Florida to up North?

A I was sent up North to guard it once it got there.

Q All right. And why were you sent to guard the marijuana?

A To keep it from getting ripped-off, stolen.

Q Now I believe you are familiar with guns,

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-2477

D. C. Docket No. 75-181-Cr-T-H

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL RICE, PEDRO ALVEREZ,

JOHN LESLIE WELLS, JR., and

JEROLD MARTIN MASSLER,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

Before JONES, COLEMAN and TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the

Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 20, 1977

APPENDIX

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

MAY 24, 1977

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans,
Louisiana 70130

TO ALL PARTIES LISTED BELOW:

No. 76-2477 - USA v. Paul Rice, Pedro Alverex, John Leslie Wells, Jr., and Jerold Martin Massler

---

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth,
Clerk

By_____
Deputy Clerk

/smg

cc: Mr. Forrest E. Campbell
Messrs. Herman I. Graber
Lynne Stewart
Allen L. Jacobi
Mr. Bernard H. Dempsey, Jr.
Mr. Robert A. Fraser
Messrs. L. Eades Houge
Milton J. Carp